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No. 06-1094

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In the Supreme Court of the United States

KRISTANTY SANUSI, ET AL., PETITIONERS

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly upheld the decision of the Board of Immigration Appeals that petitioners were not entitled to withholding of removal because they had failed to establish that they would be persecuted if returned to Indonesia.

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In the Supreme Court of the United States

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-11a) is not published in the *Federal Reporter*, but is reprinted at 188 Fed. Appx. 510. The decisions of the Board of Immigration Appeals (Pet. App. 12a), and of the immigration judge (App., *infra*, 1a-19a), are unreported.

JURISDICTION

The court of appeals entered its judgment on July 24, 2006. A petition for rehearing was denied on November 3, 2006 (Pet. App. 1a). The petition for a writ of certiorari was filed on February 1, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, defines a "refugee" as an alien who is unwilling or unable to return to his or her country of origin "because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1101(a)(42)(A). If the "Secretary of Homeland Security or the Attorney General determines" that an alien is a refugee, he may, in his discretion, grant the alien asylum in the United States. REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 101(a)(1)-(2), 119 Stat. 302 (to be codified at 8 U.S.C. 1158(b)(1)(A) (Supp. V 2005)). In addition to the discretionary relief of asylum, mandatory withholding of removal is available if "the alien's life or freedom would be threatened in [the country of removal] because of the alien's race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. 1231(b)(3)(A). The applicant bears the burden of establishing that he or she is a refugee eligible for asylum or withholding of removal. 8 C.F.R. 208.13(a), 208.16(b).

For purposes of both forms of relief, "persecution" refers to significant mistreatment by the foreign government itself or by groups or individuals that the government is unable or unwilling to control. See *In re Acosta*, 19 I. & N. Dec. 211, 222 (B.I.A. 1985), overruled in part on other grounds, *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987); see *In re Villalta*, 20 I. & N. Dec. 142, 147 (B.I.A. 1990). Persecution is an "extreme concept." *Fatin* v. *INS*, 12 F.3d 1233, 1243 (3d Cir. 1993) (Alito, J.). "[M]ere 'repugnance of . . . a governmental policy to our own concepts of . . . freedom' [is] not sufficient

to justify labelling that policy as persecution." *Id.* at 1240 (quoting *Blazina* v. *Bouchard*, 286 F.2d 507, 511 (3d Cir.), cert. denied, 366 U.S. 950 (1961)). "Many parts of the globe have ethnic conflict, even civil war, but the immigration laws do not offer asylum to all who become embroiled in such strife. Persecution differs considerably in degree and effect." *Hengan* v. *INS*, 79 F.3d 60, 62 (7th Cir. 1996) (citations omitted).

b. Regulations adopted by the Attorney General generally require an individual's eligibility for relief to be established based on persecution that is specific to and directed at that individual. Thus, to be eligible for withholding of removal, "the applicant" must prove that "his or her life or freedom would be threatened," meaning that it is more likely than not that "he or she would be persecuted." 8 C.F.R. 208.16(b)(2). In determining whether "the *applicant's* life or freedom would be threatened," however, the alien need not provide evidence that he or she would be "singled out individually" if:

> (i) The applicant establishes that in that country there is a pattern or practice of persecution of a group of persons similarly situated to the applicant on account of [a protected ground]; and
>
> (ii) The applicant establishes his or her own inclusion in and identification with such group of persons such that it is more likely than not that *his or her life or freedom* would be threatened upon return to that country.

Ibid. (emphases added).

2. Petitioners are a wife, husband, and son who are natives and citizens of Indonesia. They are also ethnic Chinese and they practice the Catholic faith. They en-

tered the United States in May 2000, but subsequently overstayed their six-month visitor visas. Three years after their arrival, petitioner Sanusi applied for asylum and withholding of removal, with her husband and son as derivative applicants, see 8 U.S.C. 1158(b)(3)(A) (Supp. IV 2004). Pet. App. 2a-4a; App., *infra*, 2a.

In support of her claims, Sanusi alleged a fear of persecution based on her Chinese ethnicity and her religion. Pet. App. 4a-6a. She alleged that, as a child, on two occasions she was "touched inappropriately" by individuals who called her or a relative "Chinese." *Id.* at 5a. Sanusi claimed that she was sexually assaulted on a third occasion, but she did not "attempt to ascribe any ethnic or religious motive to the attack." *Id.* at 6a.

Sanusi also alleged a fear of persecution arising out of riots that occurred in May 1998, which resulted in many attacks on Chinese businesses and individuals. According to Sanusi, during the riots, her family home was burned and several neighbors were beaten. Pet. App. 4a. One year later, Sanusi and her husband left for a lengthy visit to the United States. While in the United States, they did not seek asylum or withholding of removal. Instead, they returned to Indonesia in August 1999, "when her parents assured them that the situation in Indonesia had improved." *Ibid.*

Sanusi also testified that, in January 2000, a group pelted her church with stones while she was attending Mass. She did not contact the police, however, and was not aware of any other complaints being made about the event. No one was injured and the church was not damaged. Pet. App. 4a-5a. Finally, Sanusi testified that, in May 2000, during the anniversary of the 1998 riots, protestors threw rocks at the temporary housing in which her family resided and shouted "kill the Chinese."

Again, no one was injured and the home was not damaged. *Id.* at 5a.[1]

Petitioner and her family subsequently left for Singapore, and then for the United States. App., *infra*, 4a. Sanusi was able to obtain a passport and identification card from the government before departing the country. Upon petitioners' arrival, neither Sanusi nor her husband expressed to immigration officials any fear about returning to Indonesia, and they did not apply for asylum or withholding of removal for three years. *Id.* at 5a; see *id.* at 13a. Her parents and two brothers remain in Indonesia, have not been harmed, and continue to attend the same church. *Id.* at 5a, 16a.

3. a. The immigration judge held that petitioners were removable and denied their applications for relief. App., *infra*, 1a-19a. With respect to the claim for asylum, the immigration judge denied relief because the application had not been filed within one year of arrival in the United States, as required by 8 U.S.C. 1158(a)(2)(B). App., *infra*, 13a, 16a-17a. The immigration judge found that no extraordinary circumstances warranted an exception to that time limit, holding that the evidence that Sanusi had failed to apply because she suffered from post-traumatic stress disorder was not "very persuasive," *id.* at 13a, and that petitioners' excuses were "very vague and very convenient," *id.* at 14a. The immigration judge further noted that no sound reason was given for her husband's exceptional delay in filing. *Ibid.*

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[1] Sanusi's husband also testified, but he added little factual information to Sanusi's description of events. He did testify that the police "did nothing when his uncle was murdered," but that testimony was shown to be false. Pet. App. 6a.

With respect to the application for withholding of removal, the immigration judge held that petitioners had failed to meet the high burden of establishing a clear probability of future persecution. App., *infra*, 17a. While the immigration judge acknowledged that ethnic Chinese "have suffered discrimination from non-ethnic Indonesians and from the government," *id.* at 9a, the immigration judge concluded that "[t]he history in Indonesia does not indicate that there is generalized mistreatment of Chinese or Catholics by the government or by a part of Indonesian society that the government will not control or is unable to control," *id.* at 15a. See *id.* at 11a ("[O]ne could not say that * * * Catholics, or ethnic Chinese are generally persecuted."). The immigration judge further found that most problems "have occurred in places which are some distance from" where petitioners reside in the capital city of Jakarta, *id.* at 10a, so that Sanusi "would not have been affected by these attacks if she had remained in Indonesia," *id.* at 11a.

In addition to finding no pattern or practice of persecution based on religion or Chinese ethnicity, the immigration judge held that petitioners had not demonstrated that they would be singled out for persecution. With respect to the 1998 riots, the immigration judge noted that, while the house of Sanusi's family was burned, petitioners' subsequent departure occurred "without any sense * * * of urgency" and "no indication that she was escaping from something." App., *infra*, 11a. More importantly, petitioners "returned of [their] own volition," *ibid.*, which implied to the immigration judge that petitioners had "decided that they can be safe" in Indonesia, *id.* at 12a. The immigration judge thus concluded that the events of 1998 offered

little support for Sanusi's claimed fear of persecution because, "if she had a claim of persecution and she felt insecure, one would reasonably expect her to make that claim when she was in the United States and she did not." *Ibid.* The immigration judge thus accepted "on its face" Sanusi's "sworn testimony" that "she felt she could go back without a problem [and] [s]he did go back without a problem." *Ibid.*

With respect to the two rock-throwing incidents in 2000, the immigration judge concluded that they did not demonstrate that petitioners had been persecuted or would be persecuted in the future. The immigration judge noted that, while unfortunate, the two incidents had not resulted in any damage to property or injury to any persons, including petitioners. App., *infra*, 12a. The immigration judge thus concluded that the incidents were not "of sufficient magnitude or severity to support [the] conclusion" that it would not be "safe for [petitioners] to live in Indonesia." *Id.* at 13a. The immigration judge emphasized, in that respect, that Sanusi's parents and brothers have continued to live in Indonesia without mistreatment. *Id.* at 16a. The immigration judge also attached weight to the petitioners' "behavior after their arrival in the United States," *id.* at 13a, including their long delay in seeking asylum and their "unpersuasive testimony" about the reasons for that delay, *id.* at 14a, which the immigration judge concluded was inconsistent with having a significant fear of persecution, *id.* at 13a-14a.[2]

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[2] The immigration judge also rejected petitioners' claim for withholding of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19 (1988), 1465 U.N.T.S. 85, due to the lack of any evidence that petitioners had been

b. The Board of Immigration Appeals (Board) affirmed, adopting the decision of the immigration judge. Pet. App. 12a-13a.

4. The court of appeals denied the petition for review, Pet. App. 2a-11a, concluding that "petitioners' evidence does not compel us to conclude that they were eligible for withholding of removal," *id.* at 8a. The court noted that petitioners had provided "no link to the government" in identifying alleged instances of mistreatment, and petitioners "have not provided compelling evidence that the government of Indonesia was complicit or indifferent to their suffering." *Id.* at 8a-9a. The court explained that the record provided "no evidence of widespread persecution," and, to the extent there was some mistreatment, the record demonstrated that "the government was attempting to correct the problem." *Id.* at 9a. Echoing the immigration judge, the court concluded that the fact that "Sanusi's family remained in Indonesia and continues to attend the same church in Jakarta further belies the petitioners' claim that they fear future persecution." *Id.* at 10a.[3]

ARGUMENT

Petitioners ask this Court to resolve two issues: (i) whether a showing of membership in a disfavored group must be accompanied by a showing of an individu-

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tortured in the past or faced any discernible risk of being tortured in the future by the Indonesian government. App., *infra*, 17a-18a.

[3] The court of appeals also rejected a due process challenge to the immigration judge's weighing of the evidence, for which petitioners do not seek this Court's review. Pet. App. 10a-11a. Petitioners did not seek review of the denial of their claim for asylum as untimely or the denial of their claim for withholding under the Convention Against Torture.

alized risk of future persecution; and (ii) whether there is a pattern or practice of persecution of ethnic Chinese in Indonesia. Neither claim warrants this Court's review.

1. Petitioners contend (Pet. 11-13) that there is an inter-circuit conflict concerning whether a member of a "disfavored group" (Pet. 11) must demonstrate individualized persecution to establish eligibility for withholding of removal. The "disfavored group" mode of analysis was pioneered by the Ninth Circuit in *Kotasz* v. *INS*, 31 F.3d 847 (9th Cir. 1994). In that case, the Ninth Circuit acknowledged that INS regulations recognized only two means of proving a well-founded fear of persecution—by establishing either an individualized risk of persecution, or inclusion in a group that has been subjected to a "pattern or practice" of persecution and with which the individual would be identified. See 8 C.F.R. 208.13(b)(2)(iii), 208.16(b)(1) and (2). The court in *Kotasz* nonetheless minted a third standard for establishing a fear of persecution that rested upon a "significant correlation between the asylum petitioner's showing of group persecution and the rest of the evidentiary showing necessary to establish a particularized threat of persecution," such that "the more egregious the showing of group persecution * * * the less evidence of individualized persecution must be adduced." 31 F.3d at 853.

In *Lolong* v. *Gonzales*, 400 F.3d 1215 (2005), vacated, No. 03-72384, 2007 WL 1309564 (May 7, 2007) (en banc), a panel of the Ninth Circuit extended its "disfavored group" approach to hold that an alien could establish eligibility for asylum by showing that "she is not only a member of a significantly disfavored group but also a member of two sub-groups that are more likely targets for persecution: she is an ethnic Chinese Christian

woman." *Id.* at 1221. No further showing of an individualized risk was required. *Id.* at 1219-1225.

This Court's review of the application of that "disfavored group" test to petitioners is not warranted for two reasons. First, petitioners never raised the "disfavored group" argument below, nor was it addressed by the court of appeals. Neither petitioners' opening brief to the court of appeals nor their petition for rehearing urged the court of appeals to apply a "disfavored group" test or argued that application of such a standard would eliminate the need for them to demonstrate an individualized risk of persecution. Ordinarily, this Court will not consider claims that were neither raised nor addressed below. See, *e.g.*, *Travelers Cas. & Sur. Co.* v. *Pacific Gas & Elec. Co.*, 127 S. Ct. 1199, 1207 (2007); *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992) ("[T]he Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below.").

Second, there is no conflict in the circuits on the question whether membership in a disfavored group alone, without any individualized evidence of persecution, is sufficient to establish a well-founded fear or likelihood of persecution. The en banc Ninth Circuit recently revisited its precedent and overturned the *Lolong* decision on which petitioner relies (Pet. 6 n.3, 7). See *Lolong* v. *Gonzales*, No. 03-72384, 2007 WL 1309564 (May 7, 2007). In its en banc decision, the Ninth Circuit reaffirmed that aliens are not eligible for asylum "absent an individualized risk of persecution or a pattern and practice of persecution." *Id.* at *7. The court rejected the argument that petitioners advance here, and held that reliance on "fears common to ethnic Chinese Christian women generally" are insufficient to establish eligibility for asylum, let alone withholding of removal.

Id. at *6. Thus, petitioners' assertion that they "would have received a different outcome" in the Ninth Circuit (Pet. 17) lacks merit, because that court has now made clear that a "fear * * * of harassment, discrimination, and sporadic violence" that is "shared by millions of ethnic Chinese Christians in Indonesia * * * is insufficient to render [an alien] eligible for asylum absent an individualized risk of persecution or a pattern and practice of persecution," *Lolong*, 2007 WL 1309564, at *7.[4]

Nor has any other circuit adopted petitioners' "disfavored group" test as a substitute for demonstrating an individualized risk of persecution. In fact, the courts of appeals for the Seventh and Third Circuits have expressly disapproved the Ninth Circuit's prior approach. See *Firmansjah* v. *Gonzales*, 424 F.3d 598, 607 n.6 (7th Cir. 2005); *Lie* v. *Ashcroft*, 396 F.3d 530, 538 n.4 (3d Cir. 2005).

Contrary to petitioners' argument (Pet. 11-12), neither the Fourth nor the Eighth Circuit has held that membership in a "disfavored group" obviates the need to establish an individualized risk of persecution. Quite the contrary, the Fourth Circuit in *Chen* v. *INS*, 195 F.3d 198 (1999), rejected the alien's claim for asylum because he had established neither a pattern or practice of persecution that implicated him nor an individualized risk of persecution. *Id.* at 203-204. While the Fourth Circuit in dicta quoted from the Ninth Circuit's *Kotasz* decision, see *Chen*, 195 F.3d at 203, the Fourth Circuit

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[4] Moreover, although previously bound by Ninth Circuit precedent in the *asylum* context in cases arising within that circuit, the Board subsequently refused to extend the "disfavored group" doctrine to claims like petitioners' seeking only *withholding of removal*. *In re A-M-*, 23 I. & N. Dec. 737, 741-742 & n.5 (B.I.A. 2005) (denying withholding of removal to Indonesia for an ethnic Chinese Christian).

did not "embrace[]" (Pet 11) the Ninth Circuit's "disfavored group" mode of analysis, let alone petitioners' more extreme position that would dispose of the individualized persecution requirement altogether.[5]

Nor is the Eighth Circuit's decision in *Makonnen* v. *INS*, 44 F.3d 1378 (8th Cir. 1995), of help to petitioners. That decision held only that the Board may not "require a showing of persecution of *all* the members of the applicant's group" to establish a pattern or practice of persecution under 8 C.F.R. 208.13(b)(2)(i). *Makonnen*, 44 F.3d at 1383. The court then noted the Ninth Circuit's decision in *Kotasz*, and remanded the case for the Board "to consider the possibility of non-pattern-and-practice persecution." *Ibid.*; see *id.* at 1384. The Eighth Circuit itself, however, neither adopted the "disfavored group" test nor imposed it on the Board.[6]

2. Petitioners also argue (Pet. 13-17) that this Court should address whether there is a pattern or practice of persecution of ethnic Chinese and Catholics in Indone-

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[5] The Fourth Circuit never again cited *Kotasz* and has not employed a "disfavored group" test in its immigration cases.

[6] Petitioners' reliance (Pet. 12) on *Feleke* v. *INS*, 118 F.3d 594 (8th Cir. 1997), and *Agada* v. *Ashcroft*, 368 F.3d 867 (8th Cir. 2004), is equally misplaced. In both cases, the Eighth Circuit expressly stated that it had no occasion to address whether a lesser showing of persecutory risk would be appropriate if the alien established egregious group persecution because no such showing had been made. See *Agada*, 368 F.3d at 869; *Feleke*, 118 F.3d at 598-599.

sia.[7] That claim does not warrant further review for two reasons.

First, there is no genuine conflict in the circuits. The Ninth Circuit's recent en banc decision in *Lolong* joined the decisions of multiple circuits holding that there is no pattern or practice of persecution of ethnic Chinese or Catholics in Indonesia and that, in fact, the Indonesian government is working to protect such individuals. See Pet. App. 9a-10a; *Susanto* v. *Gonzales*, 439 F.3d 57, 60-61 (1st Cir. 2006); *Ming Ming Wijono* v. *Gonzales*, 439 F.3d 868, 874 (8th Cir. 2006); *Lie*, 396 F.3d at 537.

The Fifth Circuit's finding of a pattern of persecution of Christians in Indonesia in *Eduard* v. *Ashcroft*, 379 F.3d 182 (5th Cir. 2004), rested upon a record documenting in that particular case a distinct risk posed to those aliens by Islamic militants and, in particular, a group known as the Laskar Jihad. See *id.* at 189-194. Any broader statements by the Fifth Circuit were dicta.[8]

Beyond that, fact-intensive determinations upholding the Board's analysis of conditions in particular countries would not merit this Court's review in any event. Such questions are not only record-bound, but also are inherently time- and context-sensitive, and thus they do not

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[7] Although petitioners ask this Court also to consider the persecution of "Other Religious Minorities" generally (Pet. 13), they make no effort to explain either how they have standing to assert the rights of other religious minorities or how a court, on a petition for review of an administrative decision, could resolve questions not addressed in the agency record.

[8] Indeed, a subsequent unpublished decision of the Fifth Circuit found, on the record before it, that an immigration judge did not err in finding that ethnic Chinese aliens from Indonesia did not face a likelihood of persecution. *Nugroho* v. *Gonzales*, 168 Fed. Appx. 14, 15-16 (5th Cir. 2006) (per curiam).

pose the type of legal questions of enduring importance that might merit an exercise of this Court's certiorari jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2007

APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Chicago, Illinois

File A 96 496 600
File A 96 496 601
File A 96 496 602

IN THE MATTER OF KRISTANTY SANSUI, DIJONI SUSANTO LIE, STEPHEN SUSANTO, RESPONDENTS

Mar. 22, 2004

IN REMOVAL PROCEEDINGS

CHARGE:

Section 237(a)(1)(B) through Section 101(a)(15), to wit you have remained in the United States for a longer time than permitted.

APPLICATIONS:

Political asylum, withholding, and protection under the Torture Convention; alternatively voluntary departure

ON BEHALF OF RESPONDENTS:

Gillian Madsen, Esquire

ON BEHALF OF DHS:

Kim M. Kucik, Esquire
Assistant Chief Counsel
Dept. of Homeland Security
Chicago, Illinois

DECISION OF THE IMMIGRATION JUDGE

These three respondents are a family. The principle respondent in this case is Ms. Kristanty Sanusi. Hereinafter, she will be referred to simply as the respondent or as the female respondent. She is 31 years of age, married, an ethnic Chinese, and a Catholic. Her husband is 30 years of age. He's also ethnic Chinese and a Catholic as well. He will be referred to as the male respondent. Their son, Stephen, is a minor. His testimony does not enter into this case.

The respondents last arrived in the United States on May 26, 2000 as visitors. They overstayed their visitors visa, that is, they stayed beyond their period of admission, which was November 25, 2000, and were placed under proceedings with the filing of a Notice to Appear with the Court on May 6, 2003. At a hearing shortly thereafter, they appeared with their lawyers and admitted the allegations in the Notice to Appear. They did not contest the principle allegations, which are that they are citizens of Indonesia, they had visitors visas, and remained beyond their authorized time. Therefore, I find that their admissions are clear, convincing, and unequivocal evidence that they have violated Section 237(a)(1)(B) by remaining longer than permitted. I find all of them subject to removal.

Notwithstanding their removal status, they have all applied for political asylum. To qualify for political asylum, an applicant must establish either past persecution or a well-founded fear of persecution because of race, religion, nationality, or membership in a particular social group. In this case, the respondents are claiming that they have suffered past persecution and would have

experienced a well-founded fear of persecution on account of race and religion.

THE EVIDENCE

THE RESPONDENT'S TESTIMONY

The female respondent testified at a hearing on August 28, 2003 that she is an Indonesian, that she was born in Indonesia, that she is of Chinese ethnicity, and she has a family living in Indonesia consisting of her parents and two brothers and one sister. She testified that her sister lives in the United States however.

She testified that she has two children, Stephen and Stephanie, that Stephen was born in 1990 and Stephanie on September 7, 2000. She further testified that she attended school, graduating from a university in Indonesia with an accounting degree, and then worked in administration after graduation.

She testified that Indonesians can recognize her, that is, her Chinese ethnicity, by her skin color or by looking at her ID card.

She testified that there were riots in Indonesia on May 12, 1998 and through a number of days thereafter. She claimed that a lot of students were demonstrating and many Chinese restaurants were looted. She testified that on May 13, a number of shops were burned and that she left her house and went to her uncle's house and that her house was burned on that day. She testified that a number of her neighbors were beaten. She testified that the government offered no protection, that she tried to call the fire department but no on answered. She testified that she learned of the burning of her house when someone came along and told her that her house had been burned.

She testified that she came to the United States on May 4, 1999 and then decided to return on August 26, 1999 because her parents told her that things had quieted down, nothing was happening. On her return, she stayed with her parents in a shelter because their house had been burned. She testified that the people in the shelter were Christians, some were Buddhist.

She also testified that there was an event in January of 2000 when they went to mass and that there was a mob that started attacking the church and screaming. She claimed that there were mostly Catholic Chinese in the church but the mob did not enter the church, however, nor did they damage the church.

She testified that in May of 2000, they were in a shelter in Jakarta and that a mob started throwing stones, but the shelter was not damaged. She ran quickly to her uncle's house and, at that point, she decided she didn't want to live in Indonesia anymore and left Indonesia, arriving in the United States on May 26, 2000. However, she went first to Singapore, where she stayed for a few days, then to enter the United States at Los Angeles. She claimed she was emotionally unstable at the time and she cried for no reason. After two nights in Los Angeles, she moved on. She was asked whether she ever went to see a psychiatrist in Indonesia and she said no because "you don't see a psychiatrist [in Indonesia] unless you are crazy."

She opined that things are not getting any better in Indonesia and that perhaps she would have to experience the same things again, namely the attacks in May of 1998 and May of 2000, and that "I do not want to experience again" and further, "I am concerned now that I have a girl."

On cross-examination, she testified that her parents living in Indonesia are supported by her older sibling and that the family still attends the same church, that she obtained a passport and ID card before coming to the United States and that she never applied for asylum when she came to the United States on her first trip in May of 1999 "because I was scared and I didn't want to think about it anymore." She testified that when she arrived in the United States in May of 2000, she never told any Immigration officials about her fear of returning to Indonesia either.

The respondent's husband, that is, the male respondent, testified today. He testified that he's also ethnic Chinese and Indonesia and that he is Catholic. He testified that in regard to the incident in May of 2000, that he was with his wife at the church at the time and that there were people outside throwing stones at a fence, shouting 'Allah Akbar,' or 'God is great,' a Muslim chant and that no government or police officials protected them.

He also testified that his uncle was murdered by the uncle's employees, that he was hit with a block of wood and his stomach was stabbed several times and he was strangled around the neck by his own belt. He referred to an affidavit submitted by his brother attesting to this, which is in the record as Exhibit Item C-1. See letter from the respondent's brother, Deny Susanto Lie, dated June 17, 2003, describing his uncle's murder by three of his employees. The letter says that only one was caught and two others disappeared. It describes the brutal killing of the uncle and indicates in the (indiscernible) paragraph that one of the criminals planned to get married to his girlfriend and that they planned to ask the male

respondent's uncle for money and "if he wouldn't give them any, they planned to kill him." The letter also describes an incident in which his motorbike or motorcycle was stolen and that he was physically attacked. See page C-2 of his letter.

The male respondent opined that the police do not protect Indonesian of Chinese ethnicity.

On cross-examination, he was asked why they didn't apply for asylum in 1999. He came to the United States with his wife then. He answered only that he doesn't know why they didn't. He was asked also about his wife's physical condition on her departure for the United States in May of 2000 on their second trip. He opine that his wife's condition was bad but he admitted that he never took her to a doctor and stated, "Physically, there was nothing wrong with her." He stated that the reason for their leaving Indonesia was so that his wife could forget what had happened and that in the United States, "there is more freedom and you don't have to be afraid of anything." He claimed that he learned of the asylum procedure from a friend, but he couldn't name him.

OTHER EVIDENCE INCLUDING DOCUMENTARY EVIDENCE

I've considered the other evidence presented in this case and this is considerable information presented by the respondent about country conditions. I have read the Human Rights Watch World report for 2000, the State Department's report for 2002 and 2003, newspaper articles that the respondent has included with her index of exhibits submitted on August 14, 2003, some of which describe the Islamic radicals in Indonesia, as well as the bombing of the Marriott hotel in August 6, 2003 and the bombing of the two nightclubs in Bali in October of 2002,

as well as anti-Chinese riots in South Sulawesi, as well as reports on the treatment of Christians and Chinese by the U.N. Refugee Agency. I will not refer to them specifically, but I have reviewed those documents. I've also read both Country Reports and both reports on International Religious Freedom.

The respondent contends in this case that the conditions in her homeland are such that her homeland is not fit to go home to, that she has experienced sexual assault, having her home burned, and that the military and the police participate in these actions. She expressed support for the State Department's Country Report, citing various parts of it, indicating that there are 60 laws which discriminate against Chinese citizens and that radical Islamists gained a foothold in Indonesia, citing the fact that the State Department's Report on Human Rights indicates that in the last year, seven churches were attacked and that there is discrimination in the administration of religious registration of churches in Indonesia against minority churches. She maintained that this discrimination and ethnic animosity climaxed in Indonesia in the riots of May of 1998 when her house was burned and that in 2000, after her return from her trip to the United States, he experienced an angry rock-throwing mob, both at a church and also on the second anniversary of the May of 1998 attack. Finally, she contends that her uncle's killing by ethnic Chinese is simply another very severe example of this abuse and that therefore, "No reasonable person would believe that this is a country that they could safely return to."

Finally, the respondent contends that extraordinary circumstances exist for her failure to file the application within one year of her arrival in May of 2000, that is, a

psychiatrist has concluded that she suffered from post-traumatic stress disorder which went into remission, that it was only after the condition went into remission that she was able to apply.

ANALYSIS

The point of departure in this case I think is country conditions, that is, what conditions existed in Indonesia at the time the events occurred and when the respondent returned to Indonesia and what conditions exist now. I find that the respondent's testimony about what happened in May of 1998 is consistent with country conditions. The reports reflect that there were severe anti-Chinese riots that year and the government did very little to restrain[] the rioters or to investigate the causes of the riots. In fact, the Country Reports says that even now, the Chinese community complains about the lack of action to bring to justice the perpetrator of those abuses.

As far as the disturbances that the respondent has described in May of 2000 and the attack on her church in January of 2000, there is no indication that there were widespread attacks on churches in January of 2000, but the report does indicate that there have been in late-2000 attacks on quite a few Christian churches in Indonesia. So her testimony is not inconsistent with the information in these reports.

As far as her contention that Indonesia is not a country which she can reasonably call home or is not a fit country for her to return to, I disagree in some important respects with this contention. The State Department's Country Report and Reports on Religious Freedom paint a very complex picture of Indonesia which is not reduced to a few simple sentences or a few simple

sentences or a few phrases. It does indicate in the 2003 Country Report at page one that the government's human rights record remains poor and that they have abused people involved in separatist elements. They particularly cite the Aceh conflict in northern Sumatra and, or course, the 1999 violence in East Timor are two of the most serious examples. These are not examples however in which the respondent is in any way connected by virtue of her location in Jakarta or by virtue of her ethnicity.

There is support in these reports for the respondent's position that ethnic Chinese have suffered discrimination from non-ethnic Indonesians and from the government, that is, the government does not protect them in that some Indonesian extremists have abused them. The report states at page 30, for example, that during that year of 2003, Chinese citizens complained the government had not done enough to prosecute those people responsible for the 1998 violence. However, there have been examples of the government taking action to protect victims of terrorist attack. The Report on International Religious Freedom for 2003 says that the government has arrested 32 individuals for the October 12, 2002 attack in Bali and has prosecuted them.

The report also says that the government, in the 2002 Country Report, see page six at page one [*sic*] of that report that "The government generally respects the provisions that all persons have the right to worship according to his/her religious belief," noting only that there have been some restrictions on certain types of religious activity in unrecognized religions. However, it notes that official recognition has been given to Catholicism. It goes on to indicate that 80 percent of the population

were Muslim and 3.6 percent were Catholics. See page two of the report. It also indicates at page four that there are three Christian political parties. It does indicate that as a general rule, "Islam in the country remained overwhelming moderate." See page 12 of the report. "But that there was religious intolerance on the part of some Muslim extremists toward religious minorities, including Christians." See page 11 of the report.

The conclusions that I derive from this recitation are the following, that the majority of Indonesian Muslims are moderate, are non-extremist Muslims, that it is inaccurate to paint a picture of Indonesia as an intolerant society or that the government is intolerant of its minorities. It is accurate, however, to say that the government has not done enough to protect its ethnic and religious minorities, particularly when there is conflict in the country. There is no indication that the government follows persecutory policy toward Chinese or Catholic from these reports. But the reports do indicate there is a problem of Islamic extremism by some groups in Indonesia which the government is trying to combat.

Applying then this optic of country conditions to the respondents' case, I must consider first, 'Is there a widespread persecution of ethnic Chinese in Indonesia?' The answer is no, I think, to that question based on the information in the reports. 'Is there widespread persecution of Christians and specifically Catholics?' The key there is widespread and the answer, I think, to that question is no. The reports do not show widespread persecution. They do show that there have been attacks in some parts of Indonesia, which is a vast country consisting of many islands. Specifically, the attacks have occurred in places which are some distance from the respondent, in

Sulawesi and in the Malaccas, in the recent past, that is, by the recent past I mean since the respondent left Indonesia. The respondent would not have been affected by these attacks if she had remained in Indonesia.

If one could not say that Christians, specifically Catholics, or ethnic Chinese are generally persecuted by non-Chinese Indonesians or by Muslims generally, does the respondent have a history of being singled out for persecution by Muslims or by non-Chinese Indonesians? Here I think one must look at the respondents' testimony, both by the female respondent and the male respondent, to make a judgment. She testified that she grew up in Indonesia, that she received a university degree in accounting, that she went to work, that the family has a house in Jakarta, that there were riots, that in the course of the riot, the family house was destroyed and burnt. Clearly, this is an event of some significance for the family's house to be burnt.

I note that this occurred during a period of civil disturbance. There's no indication that the government was behind this rioting. There is an indication however from the various reports that the respondent has submitted that the government did not take effective action to control it. Was the respondent injured? She was not. She went to stay with her uncle and then in 1999, a year later, made a visit to the United States with her husband. She stayed only a brief period in the United States and returned to Indonesia. This trip to the United States is important for several reasons. First, it took her out of the country, a place where she claimed she could not live. She left, without any sense from her testimony, of urgency. There's no indication that she

was escaping from something which she left. She left for a visit. She returned of her own volition.

What are the implications of that? The implications, I think, are that someone who returns to the place where they claim or are claiming that they are not safe have decided that they can be safe there. In short, that anything that occurred prior to her return to Indonesia in August of 1999 is essentially rendered insignificant because the respondent was not compelled to return. Certainly, she had a limited visa and certainly, she only came for a limited time. But if she had a claim of persecution and she felt insecure, one would reasonably expect her to make that claim when she was in the United States and she did not. She said that she thought conditions had changed, her family told her to come back. It's difficult for me to evaluate what she says other than what her sworn testimony has been, accepting that on its face, then she felt she could go back without a problem. She did go back without a problem.

What happened after that? There were two particular events and that is, one, a rock-throwing incident in January of 2000 and another was another rock-throwing incident outside of the shelter where she was staying in May of 2000. The respondent was not harmed in these incidents. There is no indication of the government's complicity in these attacks, nor is there any indication that there where [*sic*] either buildings or people were harmed in any way. The church wasn't harmed, the shelter wasn't damaged, and although it appears particulary the May of 2000 event seems to have had an effect on the respondent psychologically, it certainly didn't have any physical effect on anyone because no one was injured.

I would say that these are not really significant events. I am not saying that they are of no consequence, that is, that they have no significance. But in terms of concluding, that they show that it was not safe for the respondent to live in Indonesia, I do not think that they are of sufficient magnitude or severity to support such a conclusion. The respondent says that she decided to leave Indonesia shortly thereafter and get a visa and passport and that was because of the May 2000 attack that she decided to do that and it's unreasonable to expect her to return to Indonesia given this history.

I think one needs to look at her behavior, that is, both her and her husband's behavior after their arrival in the United States, to come to terms with that statement. The respondent filed an application for asylum on May 24, 2003. She arrived in May of 2000. That was approximately just short of three years after her arrival. There is a one-year bar which I will discuss later. But in terms of the timeliness of her filing the application, I don't find her reasons for that delay very persuasive. The idea that she was suffering from post-traumatic stress disorder, I think, first, I note that that is what the psychiatrist who examined her has found but I do not think that the evidence that she has presented is sufficient to excuse the late filing. Nor do I think it's a sufficient explanation for her failure to file the application.

The reasons for my conclusion are as follows. The respondents are well-educated people. They had been to the United States before. To say that they knew nothing about asylum I think is rather improbable. First of all, it's implausible that they didn't know or wouldn't be interested enough to know if they wanted to apply. Secondly, if the female respondent was really

importuned by her psychological state, and I note in passing that she did not seek any kind of medical or psychiatric assistance for that during that period of time, there is no indication that she sought any care during the time that she was supposed to have been severely traumatized, so we do not have that effort of treatment from which to deduce that she did suffer from this problem. But even if she did suffer from the problem at that time, her husband did not and he could've applied. He did not. The testimony of her husband I find to be very vague about what caused him to apply when he did, namely hearing information about asylum from a friend. I'm not in a position and I'm not saying that I do not believe it's true. I just think it's very vague and very convenient.

Left with this unpersuasive testimony, I am forced to rely upon the circumstances, namely that they arrived in May of 2000. They were notified in May of 2003 that they were placed under proceedings. They filed for asylum in March of 2003. So many of their Immigration, their asylum process, their being brought in proceedings occurred in the first part of 2003. In short, I don't find that the respondents have demonstrated, even accepting their testimony as credible concerning the principle events in their claim, that they have been persecuted. First, because persecution means more than discrimination. As the Department has cited *Sofinet v. INS*, that is consistent with the 7th Circuit position that there must be more than a showing of discrimination. At most, there is a showing only of discrimination on the part of the Indonesian government. Even that I don't think has been established as the Indonesian government's policy. The level of harm here is not sufficient to call past persecution.

Is there reason to agree with the respondents' contention "that no reasonable person would not fear persecution in returning to Indonesia now?" A reasonable person is one who would act on past events. I do not agree with the respondents' contention that no reasonable person would be willing to return to Indonesia now given the respondents' past history. I accept the male and the female respondent's testimony as indication of their subjective beliefs or their subjective intent that they're afraid to return. The question really is, 'Is there an objective basis for that?' On the basis of this record, I have concluded that there is not. There is insufficient evidence to show that there is a reasonable possibility of mistreatment of them in the future. My conclusion in that regard is based on the scant evidence of persecution when they lived in Indonesia, particularly since they left Indonesia after the principle event, the burning of their house, and returned of their own volition. The second events, the January and the May of 2000 events, are of much less magnitude. They were not injured. These were not significant persecutory events.

The history in Indonesia does not indicate that there is generalized mistreatment of Chinese or of Catholics by the government or by a part of Indonesian society that the government will not control or is unable to control. I do not agree with the Government's contention that the situation has improved markedly. I do not think that the evidence is sufficient to show that there is a graphic line of improvement in political and social conditions in Indonesia. The report shows a more complicated picture of a very unsettled society. But the reports do indicate that the overwhelming majority of Indonesians are tolerant, moderate Muslims and they have

not all supported the anti-Chinese eruptions in May of 2000 and May of 1998.

I've also considered the fact that the respondent's parents and two brothers have continued to live in Indonesia. The respondent is no more effected by the threat of mistreatment than they are and they are living in the same place and they have not been mistreated. So I think that these circumstances together indicate that there is not a reasonable possibility of future harm to the respondents. There certainly has not been a showing by objective evidence in this case. Having concluded that the respondents have not shown either past persecution or a well-founded fear of persecution, I find on the merits that their claims for asylum must be denied.

There is a separate matter. Apart from the proceeding analysis, are they barred because they didn't apply for asylum timely? Their contention is that there were extraordinary circumstances which excused their failure to file timely and that is that was the traumatization of the female respondent because of her experiences. I see that the report of psychiatric evaluation in Attachment B-1 by Dr. Lewis cites his interview of the respondent, an interview which lasted approximately one hour, followed by a telephonic interview. His two-page letter is essentially based upon her self-reporting. He concludes from that that she suffered and states, "Ms. Sanusi gives a history of systems consistent with the diagnosis of post-traumatic stress disorder following the traumatic events which she described in her evaluaton and her affidavit."

As I've noted before, even if that is true and that is based on her self-reporting symptoms, that does not provide a sufficient explanation for their failure to file

an asylum application since her husband could've filed that application. Nor do I think that it provides an adequate explanation for an application which was only filed in March of 2003, when they entered the United States in May of 2000. The time delay in filing this I think speaks to the excuse, that is, that there were not extraordinary circumstances that excuse the delay of that magnitude. So I would find that they have not established extraordinary circumstances and consequently are barred.

I note in passing that I found and I have considered this claim based on the observations that the male and female respondent's testimony was credible. I think I need to explain further about what I mean by that. I mean only to say by credible that their testimony was consistent with their application and their deportment or their demeanor was appropriate to the matter about which they were testifying. That is not say that I agree with any fear that they have expressed or every conclusion about their own situation or their future situation in Indonesia that they have expressed. I only mean to say that on the salient event, the events that they claim to have happened, I have accepted their testimony as true in considering their claim.

I am denying their request for withholding of removal and protection under the Torture Convention for the following reasons. Having concluded that their evidence is insufficient to establish either past persecution or a well-founded fear of persecution, inevitably, their claim for withholding must fail because they would have to meet a higher burden, namely a clear probability of mistreatment because of race or religion, which they have failed to do. As far as their claim for protection

under the Torture Convention, there is no indication that they have been tortured by the Indonesian government or is that in any way implicated in their claim or torture by the government is a factor in their claim. I do not think therefore that they have established a claim under the Torture Convention.

The remaining question is the manner of the respondent's departure. They have not testified about their ability or willingness to leave the United States. I will give them the benefit of the doubt given the fact that they do not have a criminal record and the only immigration violation is an overstay. I will set a bond for them to depart however.

The respondents have declined to designate a country of removal and the Court will therefore direct removal to Indonesia.

Accordingly, the following orders are entered:

ORDER

IT IS HEREBY ORDERED that the respondents' application for political asylum, withholding, and protection under the Torture Convention be denied.

IT IS FURTHER ORDERED that the respondents be granted voluntary departure without any expense to the Government provided they depart on or before May 22, 2004.

IT IS FURTHER ORDERED that the respondents post a total departure bond of $1,500 or $500 for each.

IT IS FURTHER ORDERED that the respondents present a valid Indonesian passport by May 7, 2004 to the Department of Homeland Security.

If the respondents fail to comply with these terms, they shall be removed from the United States to Indonesia.

/s/ CRAIG M. ZERBE
U.S. Immigration Judge